



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MERU

SUCCESSION CAUSE NO.333 OF 2011

IN THE MATTER OF THE ESTATE OF JAMLICK IKIARA KIAMBATI

ALIAS JAMLECK M'IKIARA M'KIAMBATI (DECEASED)

LEAH NKIROTE JAMLICK.....1ST ADMINISTRATOR/RESPONDENT

VERSUS

HENRY GATOBU KIAMBATI.....2ND ADMINISTRATOR/APPLICANT

JOSHUA MBOGORI IKIARA.....2ND RESPONDENT/BENEFICIARY

RULING

1. By amended notice of motion under certificate of urgency dated 17th May 2021 pursuant to Section 1(a) of the Civil Procedure Act, Order 8(7) (2) of the Civil Procedure Rules and Article 159(d) (2) of the Constitution, the applicant seeks vacation of the court's earlier order restraining him from constructing a house in his share and an order that he be /allowed to complete the building at his homestead.
2. The grounds supporting the application are that the applicant was discriminated against by the respondent, who filed the cause secretly and fraudulently. He contends that the court order of 7/7/2020 was procured by fraud, collusion, perjury, gross misconduct and obstruction of justice as a result of which he continues to suffer irreparable loss and damage in contravention of Article 35 of the Constitution. In his supporting affidavit sworn on even date, the applicant wants the order of 7/7/2020 vacated so that, he can continue developing his share of L.R No. KIBIRICHIA/KIBIRICHIA/649.
3. The 1st administrator in opposing the application filed a notice of preliminary Objection on 12/5/2021, grounded on the facts that the application is not only *sub-judice* Court of Appeal Civil Appeal No 12 of 2019 but also frivolous, vexatious and an abuse of the court process. For the 2nd respondent/ beneficiary, a replying Affidavit sworn on the 27th September 2021 was filed in which it was deposed that parcel No. kibirichia/kibirichia/1989 was never part of the estate because the same had vested upon him under the doctrine of survivorship hence the judgment should be reviewed to that extent only.
4. The court on 29/9/2021 heard oral submissions from the applicant, Mr. Muthomi for the 1st administrator and Mr. Kimaita for the 2nd beneficiary. The applicant after urging the court to set aside the orders of 7/7/2020 so as to allow him develop the part of the land he has occupied for 65 years, conceded that indeed there is a pending appeal before the Court of Appeal at Nyeri and asked to be understood that he did not know that after pursuing an appeal, he could not apply for review.
5. The position taken by Mr Muthomi and Mr kimaita for the respondents was that the applicant has a pending appeal in the court of appeal and therefore if the court was to proceed with the application as filed there was real danger of its decision being at variance or conflict with that of the court of appeal. They thus asked the court to avoid such prospects by dismissing the application.
6. It is not in dispute that there pends an appeal by the applicant in the Court of Appeal challenging the same order that applicant seeks to upset by way of review. It is the law that one cannot pursue review and an appeal at the same time. With an appeal filed and pending, the applicant cannot now come back here again seeking review and/or vacation orders, subject of the appeal. Being a lay person, the applicant is reminded that the right of review and appeal cannot be sought concurrently. A litigant must elect either to seek review or to appeal, but not both.
7. In the application, the applicant seems to advance the position that the part of the land he seeks to develop is his and has been acquired by adverse possession. If that be the gist and foundation of the application, then I find that this court lacks the jurisdiction to interrogate and determine such a claim for that is the preserve of the Environment and Land Court. The same goes for the position of any boundary disputes

between the sub-titles resulting from distribution of the estate. I hold that the succession court becomes *functus officio* the moment the estate is distributed and the questions of the net estate, the identities of the beneficiaries and their shares is determined into conclusion by respective shares being transmitted.

8. The upshot from the foregoing is that the application dated 17/5/2021 is devoid of merit and the same is hereby dismissed. I make no orders as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 8TH DAY OF OCTOBER, 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Henry Gatobu in person – present

Mr. Maheu for Kimaita for 2nd respondent

PATRICK J.O OTIENO

JUDGE